STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 19,040
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals a decision by the Department of Aging and Disabilities (DAD) approving the request by the nursing home where the petitioner resides to transfer the petitioner from a room in its "sub-acute care unit" to a room in its regular long-term care unit. The issue is whether the nursing home and the Department have established that the petitioner is no longer in need of sub-acute care. Except where indicated, the facts are not in dispute.

FINDINGS OF FACT

1. In June 2003 the petitioner was admitted to the Southwestern Vermont Health Center (the "nursing home"), following a period of hospitalization for treatment of osteomylitis of her right ankle and foot. The petitioner was admitted to the sub-acute care wing of the nursing home for prescribed physical and occupational therapy. She has resided in a room in that section of the nursing home ever since.

2. At present it appears that the petitioner still receives regular care for a "wound" related to that condition, and that she is not ambulatory.

3. On April 8, 2004 the nursing home notified the petitioner that it was transferring her to a "LTC" (long-term care) bed in another unit in the same facility. The notice, signed by the Director of Social Services at the nursing home, advised the petitioner of her right to appeal this decision to DAD and to remain in her present room until the appeal was decided.

4. It appears that the petitioner verbally communicated to the nursing home her disagreement with the decision to change her room. On April 16, the Director of Social Services wrote the Department's Licensing Chief stating that it did not feel the petitioner's condition warranted continued sub-acute care.

5. On April 20, 2004 the petitioner wrote the Department's Licensing Chief stating, inter alia, that a move to another room "doesn't make sense" because she would be leaving the facility soon to return home.

6. On May 4, 2004 the Department's Licensing Chief sent the petitioner a letter notifying her: "After reviewing materials submitted to me by you as well as by the facility I

find that you no longer require care on the subacute (sic) unit. I therefore will approve the transfer."

7. On May 18, 2004 the petitioner, through her attorney, filed an appeal of this decision with the Human Service Board.

8. At the request of the parties a telephone status conference was held with the parties' attorneys on September 15, 2004. Although the petitioner raised procedural issues regarding notice and burden of proof, the hearing officer notified the parties that he saw the ultimate issue in the case to be whether the nursing home's decision, approved by the Department, that the petitioner no longer needed sub-acute care was supported by sufficient medical evidence. The parties agreed that they would each submit written medical evidence on this issue in a timely manner.

9. On September 30, 2004 the Department mailed a brief legal argument accompanied by copies of the letters summarized in paragraphs 3-6, above. On October 17, 2004 the petitioner herself sent a letter stating the reasons she feels she needs sub-acute care. On November 4, the petitioner's attorney mailed a letter containing legal arguments against the petitioner's transfer (see infra). To date, however, no additional medical evidence has been submitted by either party.

ORDER

The Department's decision is affirmed.

REASONS

The parties appear to agree that the pertinent Vermont Licensing and Operating Rules for Nursing Homes require that a resident cannot be involuntarily transferred or discharged within or from a nursing home unless "the transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility." Id. § 3.14(b). Although the petitioner raises several procedural arguments and preconditions for consideration of this matter, the petitioner and her attorney have been on notice since at least May 4, 2004 that the Department had made the factual determination that "you no longer require care on the subacute unit" (see Paragraph 6, *supra*). Moreover, the hearing officer informed counsel for both parties on September 15, 2004 that he believed it was incumbent upon both of them to submit medical evidence regarding the petitioner's need for sub-acute care. In light of the above, whatever the strengths of the petitioner's procedural arguments, or the weakness of the Department's evidence, the petitioner's failure to produce *any*

medical evidence regarding either her continuing need for sub-acute care or any harm that might result from a transfer to another room in the same facility must be viewed as an admission that such evidence does not exist. Thus, unless the petitioner were to prevail in this matter *solely* on the basis of her procedural arguments, the issue is whether the nursing home and the Department have made a *prima facie* showing that the petitioner no longer needs sub-acute care and can be transferred to a regular LTC room in the same facility without detriment to her medical condition.

To be sure, the medical evidence submitted by the Department in this regard is marginal at best. As the petitioner correctly points out, it consists *solely* of the conclusions of the nursing home itself, as expressed in a brief letter from its Director of Social Services (see *supra*). However, nothing in the Department's regulations *require* a nursing home to initially put forth anything other than its own professional judgement regarding a resident's level of care needs. A nursing home may well be on thin ice if that judgement is contradicted in any way by other competent medical opinion. However, that is not the case here.

Indeed, if the petitioner in this matter had produced any medical evidence *whatsoever* to rebut the nursing home's

position, it is highly likely she would have prevailed. However, the telling fact is that in the more than six months this matter has been pending, despite the petitioner being represented by an attorney, no such evidence has been forthcoming. Absent a claim or showing that the nursing home's opinion, as expressed by its Director of Social Services, is incompetent or untrustworthy, it must be concluded that the Department's decision is supported, however barely, by the *only* available medical evidence.

In light of the above it cannot be concluded that the Department's decision is procedurally defective. As discussed above, the petitioner has no reasonable basis to maintain that she was ever ignorant of the factual issues in this matter. Even if the "criteria for admission" to the nursing home's sub-acute care unit has not been clearly set forth, the petitioner has had ample time and access to legal advice to show that she that she has a medical need to remain there—*whatever* level of care it purportedly provides. Inasmuch as the Department's decision in this matter is in accord with the available medical evidence and consistent with the regulations, it must be affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 17.

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